A

SIA SUNG HO

v.

USAHA CENDERA CERAH SDN BHD

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-50-2003-II]
24 APRIL 2007

C ***CIVIL PROCEDURE:*** *Striking out - Want of prosecution - Appeal against - Requirement for plaintiff to file Form 63 within fourteen days from close of pleadings - Whether complied with - Rules of the High Court 1980, O. 34 - Whether there would be prejudice to plaintiff to refile action and seek appropriate remedies - Whether appeal dismissed*

D

The appellant/plaintiff appealed (encl. 71) against the decision of the deputy registrar allowing the respondent's/defendant's application (encl. 31) to strike out the plaintiff's claim for want of prosecution, pursuant to O. 25 r. 1(4), O. 34 r. 2(2), O. 27 r. (3) of the Rules of the High Court 1980 ('RHC') and/or E inherent jurisdiction of the court. The grounds of the application for encl. 31 of the respondent was, *inter alia*, (i) no notice of trial had been given, no summons for directions had been issued and no discovery made and (ii) there was inordinate and inexcusable F delay on the part of the plaintiff or his lawyers giving rise to a substantial risk that a fair trial would not be possible or cause serious prejudice to the defendants. The appellant, *inter alia*, submitted that there was no inordinate and inexcusable delay on the part of the plaintiff in prosecuting the action herein resulting G in substantial risk that it was not possible to have a fair trial of the issues in the action or any serious prejudice to the defendant to warrant the defendant's application for this action to be struck out for want of prosecution.

Held (dismissing appellant's appeal):

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(1) In light of O. 34 of RHC 1980, there is now a duty *ie*, a mandatory requirement for the plaintiff to file Form 63 within 14 days from the close of the pleadings, requiring the parties to the action to attend before the judge for purpose of seeking I directions for case management. In the event the plaintiff for whatsoever reason failed to file form 63 within the prescribed period, he must regularize the proceedings by filing an

application seeking an order to condone the delay and in the affidavit explaining the cause for the delay. Such an application is not necessary if the respondent consents to filing of form 63 out of time. In this case, this was not done and the argument placed by the appellant that the respondent could do so had no merits nor does the argument that there were interlocutory applications. A number of events have taken place after the filing of the plaintiff's cause of action and there would be no prejudice to the plaintiff to refile his action and seek the appropriate remedies limited to the current state of affairs. (para 8)

Case(s) referred to:

Aetna Universal Insurance Sdn Bhd v. Fire Accident & Marine Sdn Bhd [2001] 4 CLJ 753 HC ***(refd)***

Air Conditioning Systems Design Sdn Bhd v. Chuah Teong Hooi & Anor (as Receiver And Managers Of The Property Of Atlas Intek (M) Sdn Bhd) [1998] 4 CLJ 741 CA ***(refd)***

Arab-Malaysia Finance Bhd v. Malacca Development Corp Sdn Bhd & Ors [1997] 3 CLJ 51 HC ***(refd)***

Asas Dunia v. Tan Chee Seng & Ors [1998] 5 CLJ 63 HC ***(refd)***

Asean Security Paper Mills Sdn Bhd v. Provincial Insurance (M) Sdn Bhd (No. 2) [2000] 2 CLJ 642 HC ***(refd)***

Bernard Chai v. Klang Port Authority [1999] 5 CLJ 481 HC ***(refd)***

Birkett v. Jame [1978] AC 297 ***(refd)***

City General Insurance Company Ltd v. Robert Bradford & Co Ltd [1970] 1 Lloyd's LR 520 ***(refd)***

Confidence Concrete Sdn Bhd v. Shimizu-Peremba Sdn Bhd [1994] 3 CLJ 300 HC ***(refd)***

Dato' Leong Pow Kue & Ors v. Gan Kim Sing [1999] 5 CLJ 426 HC ***(refd)***

Jallcon (M) Sdn Bhd v. Nikken Metal (M) Sdn Bhd (No. 3) [2002] 7 CLJ 400 HC ***(refd)***

Lee Mun Tuck v. Tan Chin Kah & Anor [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929 HC ***(refd)***

Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia (sued as a firm) & Ors [1996] 2 CLJ 923 HC ***(refd)***

Palm Breeze Sdn Bhd v. Ho Hup Construction Co Bhd [1998] 5 CLJ 516 HC ***(refd)***

Ruby Investment (Pte) Ltd v. Candipark Pte Ltd [1989] 3 MLJ 396 ***(refd)***

Sim Lim Finance Ltd v. Highlight Industry Pte Ltd & Ors [1987] 1 MLJ 182 ***(refd)***

Te Cheng Hoi v. Peh Im Kweng [1994] 3 CLJ 501 HC ***(refd)***

TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin [1999] 4 CLJ 373 FC ***(dist)***

United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors [1994] 3 CLJ 144 SC ***(refd)***

A *Vasudevan v. T Damodaran & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC* ***(refd)***

Wong Sin Meng v. Wong Sam Moi & Anor [1991] 2 CLJ 1223; [1991] 4 CLJ (Rep) 221 ***(refd)***

Legislation referred to:

B Rules of the High Court 1980, O. 25 r. 1(1), (3), (4), O. 27 r. 3, O. 32 r. 2(1), O. 34 r. 2(1), (2)

For the plaintiff - KC Wong; M/s KC Wong & Assoc
For the defendant - Sunny Si; M/s Si & Assoc

C *Reported by Suhainah Wahiduddin*

JUDGMENT

D **Hamid Sultan Abu Backer JC:**

[1] This is my judgment in respect of the appellant's/plaintiff's appeal (encl. 71) against the decision of the learned deputy registrar allowing the respondent's/defendant's application encl. 31 E to strike out the plaintiff's claim for want of prosecution, pursuant to O. 25 r. 1(4), O. 34 r. 2(2), O. 27 r. (3) and/or inherent jurisdiction of the court.

[2] The grounds of the application for encl. 31 of the F respondent was that:

(a) no notice of trial has been given, no summons for directions has been issued and no discovery made; (b) no steps have been taken to set down the action for trial; (c) the plaintiff's default has been intentional and contumelious; and (d) there G has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers giving rise to a substantial risk that a fair trial would not be possible or cause serious prejudice to the defendants.

H **[3]** In opposing encl. 31, the plaintiff has filed an affidavit, *inter alia*, stating that:

(a) writ and statement of claim was issued on 9 May 2003. They were amended on 27 May 2003. Memorandum of appearance I was filed on 29 May 2003. By consent, defence and counterclaim was filed on 24 June 2003. On 16 July 2003 reply and defence to counterclaim was filed.

(b) the defendant has not filed a reply to defence and counterclaim till date.

(c) plaintiff on 29 May 2003 filed application for specific performance. A number of affidavits were filed by both parties.

(d) on 27 August 2003, at the hearing of the application before the court, the plaintiff's and the defendant's counsels conceded that from the pleadings and affidavits filed herein, there was triable issues in respect of sublots 22 and 23 and that these triable issues could only be resolved at the trial proper, but that the plaintiff was entitled to specific performance in respect of sublots 24 and 25. Accordingly, on 27 August 2003, by consent, the court ordered, *inter alia*, that "the defendant shall deliver the titles to all the Parcels in Sublots 24 and 25 of Lot 9681 Block 11 Muara Tebas Land District together with the Memoranda of Transfer and all other incidental documents to transfer the ownership of Sublots 24 and 25 to the plaintiff within fourteen (14) days from the sealing of this order", without prejudice to the defendant's defence, assertions and stand in respect of sublots 24 and 25.

(e) the period from 27 August 2003 when the order of court was given to 26 October 2004, was preoccupied with the implementation of the order of court in exploring alternative resolution to the dispute between the plaintifff and the defendant in respect of sublots 22 and 23.

(f) on 26 October 2004, the defendant's advocates wrote to the advocates of the plaintiff, indicating no possibility of alternative resolution to the dispute.

(g) on 18 November 2004, the plaintiff filed the Originating Summons No. 24-492-2004-III(II) applying for an order to remove caveat instrument No. 11367/2002 registered at the Kuching Land Registry Office on 6 June 2002, and lodged by the defendant against his land. Various affidavits were filed by both parties. On 7 March 2005, the court gave the order to remove the said caveat.

(h) in consequence of the circumstances stated above, the requirement to take out the summons for directions and notice to attend pre-trial case management was overlooked. The oversight was neither intentional nor contumelious, and in the

A circumstances of the case, the delay is not inordinate or inexcusable such as to give rise to a substantial risk that a fair trial would not be possible or will cause serious prejudice to the defendant.

B **[4]** The defendant in his supporting affidavit for encl. 31, *inter alia*, states that:

(a) there was no necessity to file a reply merely to deny the allegations contained in the defence to counterclaim as the Rules of High Court provide that there is a joinder of issue C on the defence and that pleadings are deemed to be closed.

(b) the order dated 27 August 2003 was complied with by all parties forthwith ie, from 27 August 2003, notwithstanding that the sealed copy was served on 1 October 2003. The D memoranda of transfer (sublots 24 and 25) to the plaintiff was registered on 16 October 2003 at the Kuching Land Registry. The implementation of the order was concluded within 14 days and the end result of the order was achieved within seven weeks from the granting of the order. Therefore, the E implementation of the order did not take a period from 27 August 2003 to 26 October 2004, but rather 14 days or at most seven weeks from 27 August 2003.

(c) the plaintiff's averment to alternative dispute resolution in F respect of sublots 22 and 23 is not admissible evidence for it was conducted on a without prejudice basis.

(d) the proceedings relating to Originating Summons No. 24-492-2004-III(II) and its chronology relate to a separate and distinct case and the plaintiff had stated in that proceedings G has no connection with the parties to this action. In consequences, the "circumstances" referred to whether taken separately or together cannot form any basis for overlooking summons for directions/notice to attend pre-trial case management and therefore the plaintiff's denial of intention H and contumacy is baseless.

(e) there has been an admission by the plaintiff of his indebtness to the defendants for the sum of RM800,000 as pleaded in the defence and counterclaim. In the event, the plaintiff's I action is dismissed for want of prosecution. The defendant would be entitled to have judgment by admission entered against the plaintiff for the said sum of RM800,000.

[5] The defendant, *inter alia*, submits as follows: A

(a) Order 25 r. 1(4) RHC 1980 state as follows:

(1) With a view to providing, in every action to which this rule applies, an occasion for the consideration by the court of the preparations for the trial of the action, so that: B

(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and C

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof, the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46 (in these rules referred to as a summons for directions) returnable in not less than 14 days. D

(4) If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the defendant or any defendant may do so or apply for an order to dismiss the action. E

(i) given that there was no necessity for the defendant to file a reply merely to deny the allegations contained in the defence to counterclaim dated 9 July 2003; as the Rules of High Court provides that there is a joinder of issue on the defence; pleadings are deemed to be closed after the 14 days to reply expires ie, on 23 July 2003. F G

(ii) from the above chronology, there is a delay of more than two years from the time pleadings are deemed closed to the defendant's application for dismissal for want of prosecution filed on 5 August 2005. H

(iii) the failure to take out summons for directions within one month has in many cases been construed adversely against the plaintiff. In *Dato' Leong Pow Kue & Ors v. Gan Kim Sing* [1999] 5 CLJ 426, the court stated that: I

A Thus, in *Ratnam v. Cumarasamy & Anor* [1964] 3 All ER 933, Lord Guest had this to say at p 935 of the report:

> The rules of court must, *prima facie*, be obeyed, and, in order to justify a court in extending the time during
B which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of
C the rules which is to provide a time table for the conduct of litigation.

Then there is the case of *Revici v. Prentice Hall Incorporated & Ors* [1969] 1 All ER 772, where Lord Denning MR said at p 774 of the report:

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> Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So,
E here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered.) Moreover (and this is important), not a single ground or excuse is put
F forward to explain the delay and why he did not appeal. The plaintiff had 31/2 months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more.

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In short knife stabbing words, Lord Denning MR in *Burmah Oil Co Ltd v. Bank of England* [1979] 2 All ER 461 remarked (at p 467):

> In litigation as in war. If one side makes a mistake,
H the other can take advantage of it. No holds are barred.

(iv) further in *Dato' Leong Pow Kue (supra)*, the court stated:

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> In *Lim Heng Hoo v. Tan Hock Hai & Ors* [1974] 1 MLJ 101, the plaintiff therein failed to take out summons for direction seven months after the pleadings had closed and the defendant applied for the action to be struck out for want of prosecution.

The trial court allowed the application and the appeal to the Federal Court was dismissed.

(v) no doubt that the discretion to grant or refuse an application for want of prosecution rests solely with the trial judge. Factors in considering striking out for want of prosecution is extensively deliberated in the case of *Dato' Leong Pow Kue (supra)* where it was stated:

> In graphic words, Lord Diplock in *Birkett v. James* [1978] AC 297 at p 318 had this to say on the principles of dismissal for want of prosecution:
>
> The power should be exercised only where the court is satisfied either: (i) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

(vi) the plaintiff's delay is a guise to circumvent the defendant's counterclaim whereby the defendant stands to lose RM1,048.703.40, of which RM800,000 has been admitted in consequence the delay was an abuse of process of court. In the case of *Te Cheng Hoi v. Peh Im Kweng* [1994] 3 CLJ 501 where there was a lapse of 2 1/2 years, the court readily granted the defendant's application as there was an abuse of process. The court stated:

> The plaintiff's explanation, for this delay in filing the statement of claim, that there were ongoing negotiations for settlement between the parties served only to reinforce this court's suspicion that the then primary aim of the plaintiff's action in filing only the generally indorsed writ of summons (encl 1) was to secure an interim injunction and thereafter to wait to see what he could get from the defendant.

(vii) the failure to give credible excuse for the four years delay in *Confidence Concrete Sdn Bhd v. Shimizu-Peremba Sdn Bhd* [1994] 3 CLJ 300 led the court, after ruling out faults committed by the plaintiff's solicitor, to find the plaintiffs' default intentional and contumelious. The court stated:

> On the issue that the defendants had failed to show that their application is based on the plaintiffs' intentional and contumelious default, I am satisfied that from the evidence before me, the necessary inference is that the plaintiffs' default has been intentional and contumelious. The excuses given are weak. There were ample opportunities for the plaintiffs to comply with the court order made on the summons for directions rather than complaining of the so-called delay and confusion caused by the court. At any rate, why was no action taken albeit late, after the discovery on 24 August 1991 that the matter was already with the Kuching High Court? The fault, if any, committed by the legal assistant of the plaintiffs' solicitors' firm is no excuse at all for the delay. The plaintiffs in resisting the application of the defendants, at para 13, aver that their claim discloses a reasonable cause of action and is not an abuse of the process of the court. If that be so, why the delay in prosecuting the action? Just because the plaintiffs feel that they have a reasonable cause of action against the defendants, can they with impunity be allowed to suffer the defendants with the action hanging over their heads and asking the court to wait until such time they are ready to wake up from their slumber? So for the reasons stated, I am satisfied that on this ground alone the defendants would succeed in their application to have the plaintiffs' action dismissed for want of prosecution for their failure to set down the suit for trial as ordered by the court …

(viii) the plaintiff had clearly applied delaying tactics even after change of solicitors as the chronology of events show. Besides, given the circumstances the only inference is that delay is intentional. Definition of "inordinate delay" and "inexcusable delay" is set down in *Dato' Leong Pow Kue*'s case *(supra)* where the court stated:

> The term 'inordinate delay' has been interpreted in *Leong Seng Kiat v. Law Peng Guan & Ors* [1992] 2 CLJ 825 at p 827, and *Official Assignee of the Property of Chen Chih Hsiung George (a bankrupt) v. Chi Man Kwong Peter & Ors* [1996] 1 SLR 353 to mean 'materially longer than the time usually regarded by the profession and courts as an acceptable period.' While the term 'inexcusable delay' means no more than there being no satisfactory explanation as to why the case did not proceed with due speed and diligence.

(ix) the plaintiff's affidavit provided no satisfactory explanation and/or reason whatsoever was proffered by the Plaintiff to explain the inordinate delay. The plaintiff's attempt in explaining by attributing the delay to alternative dispute resolution in respect of sublots 22 and 23 is not admissible evidence for it was conducted on a without prejudice basis and nothing more than a bare assertion and the plaintiff's reference to Originating Summons No. 24-492-2004-III(II) relates to a separate and distinct case.

(x) In *Vasudevan v. T Damodaran & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101 as summarised in *Dato' Leong Pow Kue*'s case *(supra)*, it was stated:

> In *Vasudevan v. T Damodaran & Anor* [1981] 2 MLJ 150, after the close of the pleadings the plaintiff took no further steps to prosecute the action. Seven years after the commencement of the proceedings which was instituted some 10 years after the accrual of the cause of action, the defendants then proceeded to apply to have the action struck off. The court allowed the application. The delay was held to be inordinate. It seemed that no credible excuse was given for the delay. The plaintiff merely sought to attribute the delay to the time to trace certain missing documents but the court held that this was nothing more than a bare assertion. The court further held that the documents were neither relevant nor an issue. To the court it seemed that the real reason for the delay was that the lawyers were having difficulties getting instructions from the plaintiff. The plaintiff too gave another reason and that was to wait for the outcome in two other proceedings relating to the land in question. But the court held that those other proceedings were irrelevant

A to the present dispute and that the plaintiff had not actively pursued the present action even after those other proceedings as alluded to by the plaintiff had been disposed off.

B (xi) the "circumstances" referred to by the plaintiff, whether taken separately or together, cannot form any basis for overlooking summons for directions/notice to attend pre-trial case management. Therefore, the plaintiff's denial of intention and contumacy is baseless. The plaintiff gave no credible excuse for the delay. The case of *Confidence Concrete Sdn Bhd v. Shimizu-Peremba Sdn Bhd* [1994] 3 CLJ 300 highlights the inference for the lack of credible excuse for the delay. The court's opinion was that:

D *Prima facie*, the delay can mean nothing but inordinate. So unless a credible excuse is made out by the plaintiffs, the delay is inexcusable. The suit has been hanging over the defendants' heads for that length of time. Had the move not been made by the defendants by this application, it is not known how much longer E it would be. After all, it is the plaintiffs who made the allegation against the defendants in the suit but after doing so, they went into deep slumber. On the part of the court, the suit remains in its statistics. This, when added together with the suits of other similar F plaintiffs, will naturally cause a backlog of cases which in the eyes of those concerned is not at all welcome. The image of the judiciary on the whole is at stake due to the presence of such indolent plaintiffs. …

G For my part, I would add that just as the defendant would be much prejudiced in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial, public policy and the administration of justice would also not condone the action of a plaintiff who is indolent thereby stalling the H speedy disposal of the action in court. If everyone involved complies with the rules laid down we would not be talking of backlog of cases in court. When a plaintiff files a suit against a defendant, his action adds to the volume of cases to be disposed of by the court. If by his inaction to follow the rules or orders I made, he allows himself [to fall] in deep slumber, and other plaintiffs adopt the same stand as well, then the backlog of cases in court will not be reduced if not increased. A time has come when the court must be

firm on this issue so as to be away from the problem faced. It cannot be said that by being firm, the court is doing a hurried justice for there is no hurry in the matter. It was the plaintiff who by the rules is delaying the administration of justice. Justice delayed is justice denied.

Hence, on the authority, I would say that such failure on the part of the defendants to affirmatively state why and how there would be such prejudice, is not fatal to their application. No one would argue that a four-year delay in setting down the suit for trial is not inordinate. Such being the case, it is for the plaintiffs, when faced with such an application by the defendants, to give a credible excuse as otherwise, the natural inference would be that it is inexcusable. On the serious prejudice to the defendants, as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. There is much prejudice to the defendants in having the suit against them hanging over their heads indefinitely, not knowing when it is going to be brought to trial. After all, it is the plaintiffs who chose to take an action against them. If the plaintiffs are indolent after that to pursue the matter, enjoying a deep slumber, the defendants on the other hand cannot sleep well so long as the suit is hanging over their heads. Had it not been for the defendants in this case waking up the plaintiffs from their slumber, the suit would remain in the court's record until such time as the court exercises its power under O. 34 r. 7A(2) of the RHC.

(xii) further in *Vasudevan v. T Damodaran & Anor (supra)*, the court opined:

We would specifically refer to the propositions enunciated by Salmon LJ, in *Allen* [1968] 2 QB 229, 245, 268 (at page 268) to the effect *inter alia* in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial …

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> … We would draw particular attention to the judgment of Lord Denning MR, stating (at page 389) that prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

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(xiii) the plaintiff gave no credible excuse, hence the delay was inordinate and inexcusable bearing in mind that the C defendant's defence encompasses a counterclaim of RM1,048.703.40 (of which RM800,000 has been admitted), any delay undeniably prejudices the defendants' business and finances. Financial prejudices is covered in the case of *Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia (sued as a firm) & Ors* [1996] D 2 CLJ 923 where the court stated:

> A defendant may also establish prejudice by showing that the plaintiff's delay had caused the defendant, particularly if he is running a business, financial loss. E In *Chris Smaller*'s case, Lord Griffiths clearly stated that such prejudice was sufficient to strike out an action. His Lordship said ([1989] AC 1197 at p 1209; [1989] 1 All ER 897 at p 904; [1989] 2 WLR 578 at p 587):

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> The decisions of the Court of Appeal in P*resident of India and Union of India v. John Shaw & Sons (Salford) Ltd* (The Times, 27 October 1977) and *Bridgnorth DC v. Henry Willcock & Co Ltd* [1983] CA Transcript 958 are further examples of the court taking business G prejudice into account as a ground for striking out …
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> His Lordship added ([1989] AC 1197 at p 1209; [1989] 1 All ER 897 at p 905; [1989] 2 WLR at p 587):

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> … there can be no doubt that if the defendants had been able to establish significant damage to their business interests, flowing directly from the culpable delay … a judge would have been entitled to regard it as prejudice justifying striking out the action.

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Similarly, Lord Denning MR in *Biss*'s case observed ([1978] 2 All ER 125 at p 131; [1978] 1 WLR 382 at p 389):

> So in the President of India case ... The business house was prejudiced because it could not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it.

More recently in *Antcliffe v. Gloucester Health Authority* [1992] 1 WLR 1044 and *Gascoine v. Haringey Health Authority* [1992] 3 Med LR 291, it was held that where a health authority was put into greater financial burden by the plaintiff's delay, this constituted sufficient prejudice: see generally 1 The Supreme Court Practice 1995, para 25/1/6, at p 474.

(xiv) the plaintiff's delaying tactic is plainly detrimental and prejudicial to the defendant's financial position, given the counterclaim as well as the plaintiff's indebtedness. Furthermore, the plaintiff should not be allowed to obtain an unfair advantage arising from his own admitted mistake.

(xv) the defendant's application is also for judgment by admission to be entered against the plaintiff for the sum of RM800,000 as prayed in the defence and counterclaim dated 24 June 2003. Order 27 r. 3 RHC state as follows:

> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

(xvi) in respect of O. 27 r. 3 Malaysian Court Practice High Court [27.3.2] and [27.3.4] states:

> … Admission of fact may be made in the form of an affidavit; and a failure to deny an allegation of fact may be held to be an admission of that fact for these purpose: *Aetna Universal Insurance Sdn Bhd v. Fire Accident & Marine Sdn Bhd* [2001] 4 CLJ 753. …
>
> … The words 'or otherwise' are not confined to admissions made under r. 1 or r. 4 of O. 27, but are of general application, and justify the making or giving of an immediate order or judgment where, for example, an admission is made by letter: *Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction And Engineering Works* [1991] 1 MLJ 347 at 348, 349 or an admission made by letter of facts which show that the defendant has no defence to the action: *Ellis v. Allen* [1914] 1 Ch 904.

the plaintiff did not dispute or reply or raise objections to the defendant's application for judgment on admission under O. 27 r. 3 nor did the plaintiff reply, in particularly, to the defendant's assertion in para 10 of NEC's affidavit. Such failure to deny the plaintiff's indebtedness to the defendants for the sum of RM800,000 therein should be held to be an admission. In consequence, the plaintiff's inordinate and inexcusable delay of more than two years, at the defendant's financial expense which gave the plaintiff an unfair advantage, is far too long and inordinate for this honourable court to excuse the plaintiff from the obligation imposed on all litigants by the court in relation to taking out summons for directions promptly.

[6] The appellant, *inter alia,* submits as follows:

(a) the power to dismiss or strike out an action for want of prosecution is in the discretion of the court. Such discretionary power has to be exercised in accordance with the established judicial principles. In *Birkett v. James* [1978] AC 297, the House of Lord ruled that the power to dismiss an action for want of prosecution must be exercised only where the court is satisfied either under the 1st limb and that the default of the plaintiff has been intentional and contumelious eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or under the 2nd limb:

(i) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and

(ii) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiff, or between each other or between them and a third party.

(b) In *Birkett v. James (supra)*, the English House of Lord took the view that generally, the non-expiry of the limitation period in respect of a case is a conclusive reason for not dismissing an action for want of prosecution in the case of inordinate and inexcusable delay. This is so for the obvious reason that it is still within the limitation period and further action could be brought. The above principle of law is very relevant to our present case as in our instant case the plaintiff's claim or cause of action is still not statute barred and is still within the limitation period. The above quoted principle or law has been adopted by:

(i) the Supreme Court in the case of *United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 CLJ 144 and the Federal Court in the case of *TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin* [1999] 4 CLJ 373

(ii) in *Lee Mun Tuck v. Tan Chin Kah & Anor* [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929 it has been held that the power of the court to dismiss an action for want of prosecution is a very draconian order and will not be lightly made. Similar sentiments were expressed in *Sim Lim Finance Ltd v. Highlight Industry Pte Ltd & Ors* [1987] 1 MLJ 182 (also [1986] SLR 185).

(c) in our present case, there has been no intentional and contumelious default on the part of the plaintiff. Further, there was no inordinate and inexcusable delay on the part of the plaintiff in prosecuting the action herein resulting in substantial risk that it is not possible to have a fair trial of the issues in the action or any serious prejudice to the defendant to warrant the defendant's application for this action to be struck out for want of prosecution.

(d) Order 34 r. 2(1) of the RHC 1980 provides that the plaintiff shall not, later than 14 days after the close of the pleadings, cause to be issued from the registry of the court a notice in form 63 requiring the parties to attend before the judge for pre-trial case management. However, O. 32 r. 2(1) of the RHC 1980 is only applicable where there was no interlocutory application taken up by the plaintiff which is not the situation in our present case (in which an application for summary order was issued by the plaintiff). Moreover, the reading of O. 34 r. 2(2) of the RHC 1980 provides that if the plaintiff fails to comply with O. 34 r. 2(1), the judge may direct the registry of the court to issue a notice in form 64 to the plaintiff to show cause. Order 25 r. 1(1) of the RHC 1980 requires the plaintiff to take out a summons for directions in form 46 within one month after the pleadings are deemed closed. Again, O. 25 r. 1(1) of the RHC 1980 is to govern situations where there has been no interlocutory application being filed after pleading has closed. However, in the present case at the material times prescribed by the RHC 1980, for the plaintiff to take out notice in form 63 for the parties to attend the judge for pre-trial case management (August 2003 or thereabout) and for the plaintiff to take out the summons for directions. There was a pending application to be disposed by the High Court and attempts to mediate. In the light of the above circumstances, it cannot be said to be any "intentional and contumelious" default on the part of the plaintiff. In *Bernard Chai v. Klang Port Authority* [1999] 5 CLJ 481, the plaintiff in that case failed to comply with the order for directions given by the senior assistant registrar which required the parties to serve on each other the lists of documents within 30 days and to carry out inspection within 30 days of the service of the said lists. The plaintiff took no steps in prosecuting the claim until three years later. The defendant applied for the action to be dismissed for want of prosecution. Abdul Aziz J (as His Lordship then was) ruled that for a default to be "intentional and contumelious", mere default is insufficient. To qualify the first ground for dismissal of action for want of prosecution as provided by *Birkett v. James (supra)*, it has been held that the default must be not only intentional but also contumelious. It has been held that the order given by the senior assistant registrar upon a summons for directions is not a peremptory order and a default to comply with it cannot be said to be intentional and contumelious and neither

was the conduct in not complying with the order concerned amounts to an abuse of the process of the court. In *Palm Breeze Sdn Bhd v. Ho Hup Construction Co Bhd* [1998] 5 CLJ 516, it has been held that the mere non compliance with procedural rules such as O. 25 r. 1(3) of the Rules of the High Court 1980 cannot amount to contumelious conduct. Order 25 r. 1(1) of the RHC 1980 states that the purpose of the taking out a summons for directions is:

> With a view to providing, in every action to which this rule applies, an occasion for the consideration by the court of the preparations for the trial of the action, so that
>
> a. all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and
>
> b. such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.

(e) the failure by the plaintiff to take out the summons for directions within the prescribed time of one month from the close of the pleading in this case and in the circumstances cannot amount to an intentional and contumelious default on the part of the plaintiff.

(f) there is no inordinate and inexcusable delay on the part of the plaintiff in causing to be issued the notice to attend before the judge for pre-trial management and in taking out the summons for directions which gave rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or likely to cause serious prejudice to the defendant.

(i) in *TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin* [1999] 4 CLJ 373, the plaintiffs and the defendant were children of a deceased from a different marriage. The deceased owned a parcel of land which he held as trustee for the defendant. In October 1991, the deceased passed away and sometime in 1992, the defendant took out an originating summons and obtained in the said action an *ex parte* order vesting the land in his name. In January 1993, the plaintiffs filed the writ action against the defendant claiming *inter alia* that the purported gift of the land to the defendant was null and void and obtained an injunction from the High Court restraining the

defendant from dealing with the land until further order. The plaintiff also applied on 13 March 1993 for leave to intervene in the defendant's originating summons which they obtained on 30 September 1995. The pleadings were deemed to be closed on 22 June 1995. The plaintiffs had failed to take up the summons for directions. The defendant applied to strike out the plaintiff's action for want of prosecution. The plaintiff's reasons for not filing the summons for directions were that they have applied for consolidation of their writ action with the defendant's originating summons which they could only do on 21 March 1996 as their solicitors were waiting for the sealed order to intervene. The High Court allowed the defendant's application and dismissed the plaintiff's action which was affirmed by the Court of Appeal. On appeal to the Federal Court, the Federal Court allowed the plaintiff's appeal. The Federal Court ruled that whether the delay is inordinate and inexcusable depends on the facts and circumstances of each particular case. It has been held that it is not unreasonable in the similar circumstances as in this case for the plaintiffs in that case to await for the outcome of their application to intervene and to set aside the vesting order and to take out the application for consolidation instead of summons for directions and thus it has been held that the delay cannot be said to be inordinate and inexcusable.

(ii) in the case of *Jallcon (M) Sdn Bhd v. Nikken Metal (M) Sdn Bhd (No. 3)* [2002] 7 CLJ 400, the plaintiff filed a writ against the defendant in October 1998. Pleadings had closed. The defendant applied in December 1999 for summary judgment on its counterclaim which application was allowed by the senior assistant registrar but also granted a stay of execution until the disposal of the plaintiff's claim. The plaintiff appealed to the judge in chambers against the summary judgment granted and the defendant cross appealed against the stay of execution of the summary judgment. The judge dismissed both appeals in February 2001. The plaintiff then appealed to the Court of Appeal. The plaintiff took out notice for pre-trial management only on 16 July 2001 and did not file summons for directions. The defendant then filed an application to strike out the plaintiff's action for want of

prosecution. The plaintiff's explanation was that it was awaiting the outcome of the appeal before deciding to take the next step in the proceedings of the action. The defendant's application to strike out the action for want of prosecution was struck out by the High Court as the plaintiff was motivated by the practicality of the situation and the desire to avoid wastage of court's time and to save costs and expenditure by holding one trial instead of two. Abdul Malik Ishak J after citing the Federal Court ruling in *TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin (supra)* ruled as follows:

> Here was the case where the Plaintiff had taken into account the practicalities of the whole matter and in particular the facts of the present action and the plaintiff further considered that it was reasonable for them to await the outcome of the hearing of the Court of Appeal before they proceeded with the action proper. It was, to say the least, an act to economise the time and costs of all the parties involved in the present suit. In my judgment, since there were cogent and sincere reasons as to why the summons for directions was not filed within the strict parameters of the RHC, there was thus no inexcusable and inordinate delay on the part of the plaintiff in prosecuting the present suit. I would, with respect, agree with the approach adopted by Clement Skinner JC (now Judge) in *Fenghua Development Sdn Bhd v. Asia Commercial Finance (M) Bhd (supra)*. But I venture to say that it would be purely based on the facts of each case in order to determine whether there was an inexcusable and inordinate delay.

(iii) further, in the above case, the court took the view that under O. 25 RHC there was no bar to the defendant to take out the summons for directions in the event that the plaintiff had failed to do so. If indeed the defendant had been prejudiced by the denial of their "fruits of litigation" as alleged surely, the defendant could remedy that by filing the summons for directions and expeditiously dispatch the action for trial. On the contention of intentional and contumelious delay on the part of plaintiff in that case in failing to take out the summons for directions, the court case ruled that as there was no peremptory order or unless order being made, the non-compliance by the

plaintiff to file the summons for directions within the strict definition of O. 25 of the RHC 1980 cannot be said to be "contumelious".

(iv) in *United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 CLJ 144, the Supreme Court has in fact taken into account the negotiations between the parties on a "without prejudice" basis in deciding that there was no inordinate and inexcusable delay on the part of the plaintiff in that case in prosecuting its claim in the action. Similarly, in *City General Insurance Company Ltd. v. Robert Bradford & Co. Ltd* [1970] 1 Lloyd's LR 520 the delay when the parties were in negotiation for a settlement was held not to be inordinate or inexcusable delay.

(g) even if there was inordinate or inexcusable delay on the part of the plaintiff in taking out the notice for pre-trial management and the summons for directions, that alone is insufficient to warrant the plaintiff's action to be dismissed or struck out for want of prosecution. The defendant in such application must still show that such delay will give rise to substantial risk that it is not possible to have a fair trail of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendant. The defendant in the present case has not in its affidavits filed shown or established that it was impossible to have a fair trial of the issues in the action or that serious prejudice was caused or likely to be caused to them as adumbrated in *Bernard Chai v. Klang Port Authority* [1999] 5 CLJ 481.

(h) the plaintiff's action should not be dismissed or struck out for want of prosecution as the limitation period for the cause of action has not expired. In *Birkett v. James (supra)*, the House of Lords ruled that generally the non expiry of the limitation period is a conclusive reason for not dismissing an action for want of prosecution in cases of inordinate and inexcusable delay. The reason that it is pointless to dismiss the action for want of prosecution if the cause of action is still within the limitation period as a further action could be brought and the same sentiments was expressed in *Wong Sin Meng v. Wong Sam Moi & Anor* [1991] 2 CLJ 1223; [1991] 4 CLJ (Rep) 221, *Asean Security Paper Mills Sdn Bhd v. Provincial Insurance (M) Sdn Bhd (No. 2)* [2000] 2 CLJ 642.

(i) On the defendant's prayer for judgment by admission to be entered for the sum of RM800,000 as prayed in the defence and counterclaim there is no basis for the following reasons:

(i) there is no prayer in the defence and counterclaim for RM800,000. Further, the defendant's allegation was disputed by the plaintiff.

(ii) there is no admission on the plaintiff's part that he owed the defendant the alleged and disputed RM800,000. In fact as stated earlier, the alleged loan of RM800,000 was strongly disputed by the plaintiff.

(iii) the alleged "admission" is not an admission at all. It is actually inconsistent with the issues to be determined at trial. The alleged submission could not be a basis for judgment on admission as shown in the case of *Ruby Investment (Pte) Ltd. v. Candipark Pte Ltd* [1989] 3 MLJ 396 as Justice Punch Coomaraswamy J stated that:

> If judgment on admissions was given, then it followed that the basis of the trial of this issue will be extinguished. Further, it would be anomalous if the respondents were given judgment on the admissions purportedly expressed or implied from the confirmation letters if the trial judge subsequently, as a finding of fact, held that no oral promises had been made by the appellants and that the appellants were therefore entitled to forfeit the deposit. The court was thus of the view that an application under O. 27 r. 3 should not have been made by the respondents. (10) The appeal was therefore allowed but this was not to constitute *res judicata*, and the liability of the parties was to be determined afresh at the hearing of the action, and the district judge hearing the matter was not to have any regard to what had transpired at the O. 27 r. 3 application.

(j) if there is an oversight by the plaintiff's counsel, the plaintiff should not be made to suffer by having his claim struck out on technicality instead of on its merit. The present case is a rightful case to be disposed on its merit as there is clearly triable issues to be tried by this court.

[7] The respondent in reply to the appellant's submission, *inter alia*, submits as follows:

(a) notwithstanding the without prejudice negotiations, the plaintiff by instigating a suit against the defendant has brought the responsibility squarely on himself to keep track of the matter. Reference is made to the case of *Arab-Malaysia Finance Bhd v. Malacca Development Corp Sdn Bhd & Ors* [1997] 3 CLJ 51 and the court stated:

> Counsel ought to have taken the necessary steps to set down the action for trial without waiting for instructions from his client. An advocate and solicitor has the whole conduct of the cause and he has power to act without asking his client what he shall do. He is the conductor and regulator of the cause (see *R v. Registrar of Greenwich County Court* [1885] 15 QBD 54; *Richardson v. Peto* [1840] 1 Man & G 896). Alternatively, counsel ought to have taken steps, after the lapse of a reasonable length of time in failing to communicate with his clients, to apply to court for an extension of time to set down the matter for trial on that ground. These he had failed to do and had left the matter unattended till awakened by the court. A litigant must take responsibility for and accept the consequences of delay on the part of his solicitor (see *Pereira v. Beanlands* [1996] 3 All ER 528). Thus, there was no acceptable explanation offered by the defendants on the delay in prosecuting their counterclaim. The time has come for parties to take a greater interest in litigation where they are involved. If they fail, it is the responsibility of the court to wake them up.

(b) in the case of *Air Conditioning Systems Design Sdn Bhd v. Chuah Teong Hooi & Anor (as Receiver And Managers Of The Property Of Atlas Intek (M) Sdn Bhd)* [1998] 4 CLJ 741, the excuse that out of court negotiation were in progress was used. In this instance the court stated:

> The appellant's counsel submitted that both the plaintiff and defendants are responsible for the delay. The delay, he said, was because there was negotiation for settlement of the suits outside the court …
>
> … What was uppermost in our minds was if the appellant had any submission to make, showing how the judge erred in exercising his discretion to strike out the plaintiff's suits on the ground of inordinate delay. With respect, we found this was clearly lacking in the submission of counsel for the appellant. Other than feebly trying to give a reason for the delay, the judge's reason for granting the order prayed by the defence could not in any way be faulted.

(c) In *Asas Dunia v. Tan Chee Seng & Ors* [1998] 4 MLJ 461, the court dismissing the action for want of prosecution held:

> (1) The plaintiff did not take further steps in the proceedings since October 1996. There was no merit in the plaintiff's contention that the delay was caused by the pending appeal before the Court of Appeal. Although the appeal related to the same land, it concerned an application for removal of a caveat. Hence, it was not a valid ground for not proceeding with the present suit. In any event, no application for a stay of proceeding had ever been filed by any party. The delay was intentional and contumelious and therefore, the plaintiff's action was liable to be dismissed for want of prosecution (see pp 463H-I and 464A-B); *Toh Hock Thye & Ors v. Toh Chwee Biow* [1982] 1 MLJ 152 followed.
>
> (2) The brief negotiation between the parties which turned out to be inconclusive took place in December 1996 to January 1997, but there was no evidence of any effort to effect an amicable settlement after that. Mere efforts to effect a settlement by themselves do not afford a valid answer. In the present case, although there were efforts to settle, there was no earnest desire on the part of both parties to reach an amicable settlement (see p 30 464B-C, E, I); *United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73 distinguished.

(d) the assertion of the plaintiff that the defendant should take out the summons for directions "in the event the plaintiff had failed to do so" is not correct in law. Instead of giving explanations, the plaintiff is trying to dole out the blame for their delay. The defendant has no obligation to file summons for directions to move the plaintiff's case along and to suggest so would be ridiculous. Instead, to awaken the plaintiff from its slumber, the defendants were constrained to take out this application to have the plaintiff's claim dismissed and in order to proceed with their counterclaim.

(e) the case of *TM Feroze Khan & Ors v. Meera Hussain bin TM Mohamed Mydin* [1999] 4 CLJ 373, which is referred to by the plaintiff is distinguished. There is no question of consolidation in the instant case as the issues of law are separate and distinct and relief claimed arise out of different transaction. The case of *Bernard Chai v. Klang Port Authority*

(supra), cited by the plaintiff, is a case on failure to comply with pre-emptory orders given under summons for directions unlike the present case where summons for directions was not taken out by the plaintiff at all. With regards to the case of *Palm Breeze Sdn Bhd v. Ho Hup Construction Co Bhd (supra)*, again cited by the plaintiff, the issues were whether the second action filed ought to be struck out for contumelious conduct and breach of 'unless' order. However, the facts of that case has no relevance to the facts of this instance.

(f) the fact that the plaintiff has nothing to say to the defendants' application for judgment for the sum of RM800,000 is an admission in itself. In *Aetna Universal Insurance Sdn Bhd v. Fire Accident & Marine Sdn Bhd* [2001] 4 CLJ 753, the court stated:

> The pleadings and affidavits showed a clear, consistent and unequivocal admission by the defendant of its indebtedness to the plaintiff in respect of the plaintiff's claim. The defendant by its own admission had unwittingly agreed that the trial would only pivot on whether the sum specified as a set-off on its counterclaim could be legally deducted from the sum admittedly owed to the plaintiff. The senior assistant registrar was thus justified in granting judgment in favour of the plaintiff and his finding was not perverse to the intention of the rules, ie, to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed.

[8] I have considered the submission of the appellant and respondent in detail. The practice, procedure and principles relating to dismissal of suit for want of prosecution in my view is almost settled. The cases which the appellant and respondent had submitted set out only the guiding principles and revolve on their own facts, The decisions were made according to the justice of the case and it is not necessary for me to deliberate on trite principles. However, all these cases must now be seen in the light of O. 34 of RHC 1980 which was introduced recently to ensure effective and expeditious disposal of cases. There is now a duty ie, a mandatory requirement for the plaintiff to file form 63 within 14 days from the close of pleadings, requiring the parties to the action to attend before the judge for purpose of seeking directions for case management. In the event the plaintiff for whatsoever reason fails to file form 63 within the prescribed period, he must regularise the proceedings by filing an application seeking an order

to condone the delay and in the affidavit explaining the cause for the delay. Such an application is not necessary if the respondent consents to filing of form 63 out of time. In this case, this was not done and the argument placed by the appellant that the respondent can do so has no merits, nor does the argument that there were interlocutory applications. Further, the appellant in attempting to shelter under the pretext that the court itself did not issue form 64 to show cause can be construed to border within the principles of contempt. The appellant's plea that it is a waste of judicial time to dismiss the matter as the limitation has not set in and the appellant should not be faulted for the omission of his solicitor has some merits. I am inclined to subscribe to the proposition that the court should not ordinarily dismiss an action purely for non-compliance of rules which can be compensated by costs provided that the delay was not an attempt to waste judicial time or prolong the disposal of the case. However, on the facts of this case, I think a number of events have taken place after the filing of the plaintiff's cause of action and there will be no prejudice to the plaintiff to refile his action and seek the appropriate remedies limited to the current state of affairs.

[9] For reasons stated above it is my judgment that the appellant's appeal, encl. 71 must be dismissed with costs and costs to be taxed and paid to the respondent. I hereby order so.